Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

NO. 80-188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

RUDOLPH KONSCOL,

Petitioner,

VS.

THE STATE OF GEORGIA EX REL
FRANCES KONSCOL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED

No question is properly presented for consideration in this Court, since none of the questions asserted by the petitioner were properly raised in the State Courts.

STATEMENT OF THE CASE

An action under the Uniform Reciprocal Enforcement of Support Act was filed by Frances Konscol, as Plaintiff, against Rudolph Konscol, as Defendant, on June 23, 1978, seeking alimony for support of the Plaintiff as provided in a final judgment of divorce dated June 26, 1974, in Case No. M-1200-73, Superior Court of New Jersey, Chancery Division, Union County. The Defendant, Rudolph Konscol, filed an answer and response to said action, in which it was alleged that the Plaintiff was not entitled

to support under the provisions of the Uniform Reciprocal Enforcement of Support Act. There were no constitutional issues raised by the pleadings, and upon the trial of the case, there were no constitutional issues raised by objections to the evidence or in any other appropriate manner. This is set forth in the Order of March 26, 1979, attached to Petitioner's Petition for a Writ of Certiorari to the Supreme Court of the State of Georgia (hereinafter referred to as Petitioner's Appendix) as Appendix B, and the Petitioner has not disputed this fact.

Petitioner attempted to raise the constitutional issue for the first time in his Amendment to the Motion for New Trial, Petitioner's Appendix C. The Superior Court of Gwinnett County did not pass on the constitutional issue, since it was not raised at trial. See the Order of March 26, 1979, Petitioner's Appendix B. The Georgia Court of Appeals reviewed the case and affirmed the trial court because Petitioner's constitutional challenge was not timely made. See Petitioner's Appendix D. The Petitioner did not appeal the decision of the Court of Appeals of Georgia, and after it became final, it was made the judgment of the Superior Court of Gwinnett County on October 31, 1979. See Respondent's Appendix A.

A petition for contempt was filed November 27, 1979, and Petitioner again attempted to raise the constitutional issue. See Petitioner's Appendix F. Petitioner's only defense to the contempt action was the constitutionality of laws not properly raised at trial, the very issue which had just been decided by the Court of Appeals of the State of Georgia without appeal by the Petitioner from that decision. Therefore, the Superior Court of Gwinnett County adjudged Petitioner to be in contempt. See Petitioner's Appendix G. Petitioner appealed the ad-

judication of contempt to the Supreme Court of Georgia, which dismissed the appeal pursuant to Ga. L. 1979, p. 619 (Code Ann. § 6-701.1), since the issue had been decided by the Court of Appeals and allowed to become final without appeal by Petitioner. The Supreme Court of Georgia did in dicta note that the constitutional challenge was not timely made and would not have been considered had a timely appeal been filed. See Petitioner's Appendix A.

REASONS THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

1. THE CONSTITUTIONAL ISSUES ASSERTED BY PETITIONER WERE NOT PROPERLY AND TIMELY RAISED IN THE STATE COURTS AND THIS COURT HAS NO JURISDICTION.

It is not disputed that Petitioner first attempted to raise the constitutional issues after the trial of the case in an Amendment to his Motion for New Trial. It is a clear and established rule of procedure in Georgia that the constitutionality of a law cannot be drawn into question for the first time in a Motion for New Trial where the question was not raised in the pleadings, by objection to the evidence, or in some other appropriate way pending the trial of the case. *E. P. v. State*, 230 Ga. 770 (199 S.E.2d 313) (1973); *Moore v. State*, 194 Ga. 672 (22 S.E.2d 510) (1942); *Hendry v. State*, 147 Ga. 260 (93 S.E. 413) (1917). Failure to raise the questions in a proper and timely manner at the trial as required by State law precludes review by this Court. See C. Wright, Federal Courts 541-542 (3d ed, 1976). In *Orr v. Orr*, 440 U.S. 268 (59 L.Ed. 2d 306, 99 S. Ct. 1102) (1979) at p. 274, this Court noted this jurisdictional question and in footnote 4, this Court stated,

> "This does not preclude any other State, or even Alabama in another case, from holding that contempt proceedings are too late in the process to challenge the constitutionality of a divorce decree already entered without constitutional objection – assuming, of course, that the State's prior proceedings permit fair opportunity to assert the federal right, see NAACP v. Alabama, 377 U.S. 288 (12 L.Ed.2d 325, 84 S. Ct. 1302) (1964). Indeed, as our Brother Powell points out, post at 286, 59 L.Ed.2d at 324, Alabama apparently has a similar rule. See Hughes v. Hughes, 362 So.2d 910 (Ala Civ App), cert dismissed as improvidently granted, 362 So.2d 918 (Ala 1978), appeal docketed, No. 78-1071. There is, therefore, no reason for concern that today's decision might nullify existing alimony obligations. . ."

The Supreme Court of Georgia has held that, "[t]he fact that the alimony laws were declared unconstitutional pending his appeal (cits. omitted), does not require a different result." *Kosikowski v. Kosikowski*, 243 Ga. 413 (254 S.E.2d 363) (1979); *Kirkpatrick v. Kirkpatrick*, 243 Ga. 736 (256 S.E.2d 465) (1979) (contempt proceedings).

2. THE PETITIONER IS BARRED FROM ASSERTING AN ISSUE PREVIOUSLY DECIDED ADVERSELY BY THE DOCTRINE OF RES JUDICATA.

The Court of Appeals of Georgia decided that the constitutional challenges by petitioner were not timely and properly made. *Konscol v. Konscol*, 151 Ga. App. 696 (261 S.E.2d 438) (1979). Petitioner allowed the decision to become final and did not appeal from it. The remittitur was entered in the trial court as shown in Respondent's Appendix A. The ruling of the Court of Appeals of Georgia became the law of the case and the same question could not be raised in the contempt proceeding to en-

force an order entered after the original trial. *Turner v. Harper*, 234 Ga. 891 (218 S.E.2d 621) (1975); *R.O.A. Motors, Inc. v. Taylor*, 220 Ga. 122 (137 S.E.2d 459) (1964). In *Perry v. McClendon*, 62 Ga. 598, 604 (1879), the Supreme Court of Georgia said, "No party, plaintiff or defendant, is permitted to stand his case before the Court on some of its legs, and if it falls, set it up again on the rest in a subsequent proceeding, and thus evade the bar of the former judgment . . . He must discharge all his weapons, and not reserve a part of them for use in a future encounter. He must realize that one defeat will not only terminate the campaign, but end the war."

Therefore, the final determination by the Court of Appeals of Georgia in *Konscol v. Konscol*, supra, of the same issue petitioner seeks to raise again is a bar to any further litigation. If this were not the rule, there could be endless litigation of the same issues and the Courts could be rendered powerless to finally resolve a case.

CONCLUSION

For the reasons set out above, the Respondent shows that the Petition for a Writ of Certiorari to the Supreme Court of Georgia should be denied.

Respectfully submitted,

BRYANT HUFF
P. O. Box 569
Lawrenceville, Georgia 30246
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 1980, three copies of this Brief on Petition for a Writ of Certiorari were mailed, postage prepaid, to G. Hughel Harrison, Attorney at Law, Post Office Box 88, Lawrenceville, Georgia 30246, Counsel for the Petitioner, and to Arthur K. Bolton, Attorney General of the State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334. I further certify that all parties required to be served have been served.

BRYANT HUFF, District Attorney
Gwinnett Judicial Circuit
Post Office Box 569
Lawrenceville, Georgia 30246
Counsel for Respondent

APPENDIX

APPENDIX A

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, October 11, 1979

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

58315 RUDOLPH KONSCOL v. FRANCES KONSCOL

This case came before this court on appeal from the Superior Court of Gwinnett County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. McMurray, P.J., Banke and Underwood, JJ., concur.

FILED IN OFFICE
OCT 30 1979
/s/ O. MILLARD PEEVY
CLERK SUPERIOR COURT
GWINNETT COUNTY, GEORGIA

BILL OF COSTS, $30.00

COURT OF APPEALS OF THE
STATE OF GEORGIA

Clerk's Office, Atlanta, Oct. 29, 1979

I certify that the above is a true extract fr
minutes of the Court of Appeals of Georgia, and that G. Hill Harrison paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS, Clerk

JUDGMENT ON REMITTITUR

The within and foregoing case having been appealed to the Court of Appeals of the State of Georgia, and the judgment of this Court having been affirmed by said Court, the judgment of the Court of Appeals of the State of Georgia is hereby made the judgment of this Court.

SO ORDERED, this 31st day of October, 1979.

/s/ H. M. STARK

HOMER M. STARK, Judge
Gwinnett Superior Court